UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

NORTH AMERICAN PIPE CORPORATION

and **CASES 26-CA-21773**
26-CA-21833

UNITE HERE, AFL-CIO, CLC

Rosalind Eddins, Esq., for the General Counsel.
Ira Jay Katz, Esq., for the Union.
L. Chapman Smith, Esq., for Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, **Administrative Law Judge**. This case was tried in Fort Smith, Arkansas, on January 13 and 14, 2005. The original charge in 26-CA-21773 was filed by Unite Here, AFL-CIO, CLC (the Union) on July 6, 2004,[1] and amended on September 30, 2004. The original charge in 26-CA-21833 was filed by the Union on August 26, 2004 and amended on October 27, 2004. Based upon the allegations contained in these amended charges, the Regional Director for Region 26 of the National Labor Relations Board (the Board) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on November 30, 2004. The complaint alleges that North American Pipe Corporation, herein Respondent, violated Section 8(a)(1) of the National Labor Relations Act, (the Act), by maintaining an unlawful no solicitation rule, by prohibiting employees from distributing Union literature on the Respondent's parking lot,[2] and by selectively and disparately enforcing a rule in its employee handbook. The complaint also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by awarding 100 shares of stock to

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[1] All dates are 2004 unless otherwise indicated.

[2] The consolidated complaint alleged that on or about June 23 and 30, 2004; Plant Manager Danny Ming prohibited an employee from distributing union literature to other employees on Respondent's parking lot. During the hearing, the undersigned granted Counsel for the General Counsel's Motion to Amend the Complaint to add Ray Dudley as a supervisor and/or agent of Respondent and to allege an additional 8(a)(1) violation that on or about late August 2004, Dudley prohibited employees from distributing union literature to other employees on the Respondent's parking lot. Respondent admits that Dudley is a supervisor/agent but denies the alleged 8(a)(1) violation.

employees without notice to or bargaining with the Union. Respondent filed a timely answer to the complaint denying the alleged unfair labor practices.

On August 23, 2004, Forest Caple, an individual, filed a petition in Case 26-RD-1107 seeking an election to determine whether the Union should remain the exclusive collective bargaining representative of Respondent's employees, in a unit of production and maintenance employees and truck drivers employed at Respondent's Van Buren, Arkansas facility. On January 11, 2005, the Regional Director entered an order, consolidating cases 26-CA-21773, 26-CA-21833, and 26-RD-1107 for the purpose of a hearing before an administrative law judge. After the conclusion of the hearing, I ordered that case 26-RD-1107 be severed from cases 26-CA-21773 and 26-CA-21833 and remanded to the Regional Director for Region 26. Accordingly, I have made no findings with respect to Case 26-RD-1107.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, manufactures polyvinyl chloride piping products at its facility in Van Buren, Arkansas, where it annually sells and ships goods valued in excess of $50,000 to points located outside the state of Arkansas. Annually, Respondent purchases and receives at its Van Buren, Arkansas facility, goods valued in excess of $50,000 from points located outside the state of Arkansas. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I also find the following employees of Respondent to constitute a unit[4] appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of its Van Buren, Arkansas plant, including truck drivers, but EXCLUDING office clerical employees, plant clerical employees, guards, laboratory technicians, professional, employees, inspectors, supervisors as defined in the Act and all other employees

[3] On February 3, 2005, and after the close of the hearing, Counsel for the Union moved to supplement the record to add the listing of basic hourly wage rates for the Van Buren plant that had been inadvertently omitted from the collective bargaining agreement previously admitted into evidence as General Counsel Exhibit No. 2. Counsel for the General Counsel joined in the motion and the motion was unopposed by Respondent. There being no objection, the Basic Hourly Wage Rates identified as Exhibit A to the collective bargaining agreement is received into evidence to supplement General Counsel Exhibit No. 2.

[4] In its answer to the consolidated complaint, Respondent admits that there was a labor agreement between the Union and Respondent for the period from November 20, 2001 through October 31, 2003. While Respondent does not specifically admit the appropriateness of the Unit as alleged, there is no record evidence to the contrary.

excluded by law.

II. Alleged Unfair Labor Practices

A. Background

Respondent, a subsidiary of Westlake Chemical Corporation, operates several facilities throughout the United States, including a plant in Van Buren, Arkansas, where it manufactures polyvinyl chloride piping products. In addition to the Van Buren facility, Respondent also has plants in Litchfield, Illinois; Calvert City, Kentucky; Wichita Falls, Texas; Lake Charles, Louisiana; Gelsmar, Louisiana; Booneville, Mississippi; Greensboro, Georgia; Springfield, Kentucky; Evansville, Indiana, Bristol, Indiana; Leola, Pennsylvania; and Pawling, New York. The employees at Respondent's Calvert City, Kentucky facility are also represented by a labor organization. The Union represents approximately 50 production and maintenance employees at the Van Buren facility. The most recent contract between the Respondent and Union was effective from November 20, 2001 to October 31, 2003. The agreement provides that the contract continues in effect from year to year unless either party gives written notice of a desire for changes in or termination of the agreement at least 60 days prior to the anniversary date.

On October 7, 2003, Union Regional Director Jean Harvey sent a letter to Respondent, requesting the reopening of the contract for the purpose of modification and amendment. In a letter dated October 14, 2003, Steven Edwards; Respondent's Corporate Human Resources Manager, notified the Union that its request to reopen the contract was untimely as it was outside the requisite 60 day period. By letter dated January 2, 2004, the Regional Director for Region 26 notified Respondent that a petition had been filed to decertify the Union. On January 9, 2004, the Region notified all parties concerning the status of the petition. Specifically, the Region's letter explained that based upon the Union's October 7, 2003 letter and Respondent's October 14, 2003 letter, as well as the Union's failure to timely reopen the record, the contract served as a bar to any election at that time.

B. The Union's Handbilling

Union Representative Ray McKinney testified that because the Union missed the opportunity to negotiate in 2003, the Union began preparing for 2004 negotiations in June 2004. On June 23, McKinney began distributing handbills to employees in Respondent's parking lot. Union Secretary/Treasurer Daleva Sullentrup and Union President Steve Tabor accompanied him. While Tabor is employed as a first shift operator at Respondent's Van Buren facility, he was not on duty on June 23. There is no dispute that Plant Manager Danny Ming informed Tabor and the union representatives to leave the parking lot and to take their handbilling to the sidewalk. McKinney testified that Ming informed him that if they did not leave the parking lot, he would contact the police.

On June 24, Ming issued a memorandum to all employees concerning the Union's handbilling. In the memorandum, Ming reminded employees that the contract provides that the Union "shall be granted reasonable access to the working areas of the plant, during working hours *for the purpose of investigation of a grievance* arising under the terms of this agreement." Ming explained that the contract does not allow the Union to come onto plant property unannounced to conduct "their business." Ming not only referenced the company

policy concerning plant visitors, but also reminded employees "the Company Solicitation policy protects you from being confronted by anyone and asked to accept literature and/or participate in any non-work related endeavor."

In the memorandum, Ming also noted that some of the information distributed by the Union included the statement: "Last year the company said that we didn't need a raise." Ming explained that this was not true and that it was not the company's fault that the contract was not open for negotiation. He went on to explain that it was the Union who failed to request a new contract.

When Tabor again handbilled in the parking lot on June 30, Ming asked him if he were soliciting. Tabor responded that he was handing out leaflets. Ming told him to take his solicitation to the sidewalk. Ming confirmed that he observed handbilling in the parking lot on two to four occasions. He testified that he did not recall if employees were present with the Union representatives each time. He did recall at least one occasion when Tabor was present with the Union representatives. He acknowledged that he asked Tabor and the representatives to leave the parking lot and that he threatened to call the police if they did not do so.

The record reflects that Tabor and McKinney additionally handbilled in the parking lot in late August when Respondent's Manufacturing Manager Ray Dudley visited the Van Buren plant. Dudley does not deny that he also told the handbillers to refrain from handbilling in the parking lot. Tabor testified that he and the other handbillers moved to the sidewalk after speaking with Dudley.

C. The Union's Grievance

On July 14, 2004, Tabor filed a grievance alleging: "Violation of National Labor Relations Act: Employer denying employee access to company parking lot to pass out union information to fellow employees during the employee's off time (off the clock)." Ming responded to the grievance on July 16, 2004. In his written response, Ming explained that because the plant parking lot is company property, it is covered under the "no solicitation" policies maintained by "both the plant and the Company." In support of his position, Ming cited not only the Van Buren "Plant Work Rules," but also the North American Pipe Corporation "Rules of Conduct" that prohibits "solicitation on company premises without authority or during regular work hours." Additionally, Ming asserts that the North American Pipe Corporation "Rules of Conduct" prohibits "starting or nurturing false, malicious rumors or information about fellow workers, the company, or its products." Ming stated that the material[5] distributed by the Union was false and malicious. In further support of Respondent's position, Ming asserted that the contract reserves the right of management to require employees to observe Respondent's rules and regulations not inconsistent with the contract and he cited the contract section that gives the Union reasonable access to the plant "for the purpose of investigating grievances."

After Respondent raised a timeliness defense to the processing of Tabor's grievance,

[5] Ming specifically referenced the handbill's language "the Company said that (employees) didn't need a raise."

the Union withdrew the grievance.

D. Respondent's Corporate and Plant Rules

The plant rules for the Van Buren plant contain various infractions for which disciplinary action may result. Section B of the rules contains infractions that, depending upon the severity, may lead to discipline ranging from a verbal warning to a disciplinary lay-off. Item B. 12 provides:

> SOLICITING OF OR BY EMPLOYEES FOR SALE OF ANY ITEM OR THE COLLECTING OF FUNDS IS NOT PERMITTED WITHOUT THE WRITTEN AUTHORIZATION FROM THE PLANT MANAGER[6].

The North American Pipe Corporation's 2003 handbook provides:

> People are often annoyed by solicitation on the job. Such activities can interfere with work or quality of our product. Under the circumstances, we have established rules that forbid solicitations (except those sponsored by the company) or the distribution of literature during work time and in work places. Also, to keep work areas clean and orderly, we cannot allow the distribution of literature in work areas.[7]

The 2003 employee handbook also lists a series of rules for acceptable conduct. The handbook provides: "Failure to abide by the rules can lead to some form of corrective action up to and including discharge." Included in the list of unacceptable actions is: "Solicitation on company premises without authority or during work hours."[8] Also listed as unacceptable action is: "Starting or nurturing false, malicious rumors or information about fellow workers, the company, or its product."[9]

E. Whether Respondent Maintained an Unlawful No-Solicitation Policy

Paragraph 6 of the Complaint alleges that since about February 25, 2004, Respondent has maintained a provision in its corporate employee handbook that "solicitation on company premises without authority or during regular work hours" constitutes a violation of its Rules of Conduct.

As the Board reiterated in *A.P. Painting and Improvement, Inc*., 339 NLRB No. 157, slip op. at 3 (2003), "a rule that prohibits union solicitation or activities on 'company time' is overbroad and presumptively invalid because it could reasonably be construed as prohibiting solicitation at any time, including break times or other nonwork times." See also *M.J. Mechanical Services, Inc*., 324 NLRB 812, 813 (1997); *Gemco*, 271 NLRB 1190 (1984). The long established principle is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Additionally,

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6 General Counsel Exhibit 12.
7 General Counsel Exhibit 6, page 37.
8 General Counsel Exhibit 6, page 34.
9 General Counsel Exhibit 6, page 35.

the validity of a no-solicitation rule turns on whether the prohibition applies only to time the employees are working at their jobs. If so, the rule is presumptively valid. If the prohibition, however, covers all working hours, the rule is presumptively invalid. *St. Mary Medical Center*, 339 NLRB No. 51, slip op. at 10 (2003).

Respondent does not dispute that the employee handbook prohibits "solicitation on company premises without authority or during regular work hours." Respondent contends, however, that such a statement in a bullet-point list of "unacceptable actions" is merely a shorthand summary of the complete no-solicitation, no-distribution rule found on a different page of the employee handbook. Specifically, the section of the handbook upon which Respondent relies includes: "People are often annoyed by solicitation on the job. Such activities can interfere with work or quality of our product. Under the circumstances, we have established rules that forbid solicitations (except those sponsored by the Company) or the distribution of literature during work time and in work places. Also, to keep work area clean and orderly, we cannot allow the distribution of literature in work are as."

Respondent argues that its complete rule found on page 37 of the employee handbook governs the short version cited on page 34 of the handbook. Relying upon *Mediaone of Greater Florida, Inc*., 340 NLRB No. 39 (2003), Respondent argues that the Board has held under virtually identical facts that employees would reasonably believe that a company's no-solicitation policy would be that set forth in full in an employee handbook rather than the handbook's shorthand summary of the rule. As in the present case, *Mediaone* dealt with an employee handbook that included two sections pertaining to a prohibition for solicitation. In *Mediaone*, the employee handbook included a 35-page section entitled "Business Integrity and Ethics Policies." There was not only a title page, but also a two-page table of contents entitled "Business Integrity and Ethics Policies At a Glance" that paraphrased each policy and listed the page number where the full policy could be found. One of the policies paraphrased in the "At a Glance" section involved employee solicitation, stating "You may not solicit employees on company property" and included the page number for the full policy. The parties did not dispute that the full policy was valid on its face. The Board determined that employees would reasonably find that the respondent's no solicitation rule was the one referenced in the summary and not the summary itself.

I find the facts of this case distinguishable from those in *Mediaone*. In the instant case, the provision of the employee handbook that prohibits solicitation "on company premises without authority or during regular work hours" is listed as a separate rule under the Rules of Conduct in the corporate handbook. The preface to the Rules of Conduct states that failure to abide by the listed rules can lead to some form of corrective action up to, and including, discharge. Neither the preface nor the Rules of Conduct reference the Solicitation/Distribution of Literature found on page 37 of the handbook. Unlike *Mediaone,* there is nothing to direct employees to a more fully explained or less restrictive solicitation policy. The lack of reference to a full and valid solicitation policy prevents a finding that the provision at issue is simply a shorthand summary of a valid rule. Interestingly, however, the otherwise valid solicitation policy found on page 37 references the fact that Respondent has established rules that prohibit solicitations and thus arguably references the invalid rule. Based upon the language found in both sections, there is no reason to conclude that employees would reasonably understand that the language found on page 37 is controlling rather than the no solicitation policy on page 34 that threatens discipline if violated. Thus, unlike the circumstances found in *Mediaone*, the two handbook passages referencing

Respondent's no solicitation policy do not lend themselves to interpretation as one solicitation policy.

The employee handbook provides on page 34 that solicitation on company premises without authority or during regular work hours is an unacceptable action and is subject to disciplinary action. In *MTD Products, Inc*., 310 NLRB 733 (1993), the Board found that an employer's rule prohibiting solicitation or distribution on company premises unless approved by the company to be presumptively invalid and overly broad. The Board went on to explain that an employer can avoid the finding of a violation by showing through extrinsic evidence that its rule was communicated or applied in such a way as to convey an intent to clearly permit solicitation during break time or other periods when employees are not actively working. See *Our Way, Inc*., 268 NLRB 394 (1993); *T.R.W. Inc*., 257 NLRB 442, 443 (1981). Respondent has not only failed to make such a showing but the evidence demonstrates that the Respondent specifically applied its overly broad no solicitation policy to Tabor's activities while off duty and required him to leave company property when he attempted to handbill on behalf of the Union. Accordingly, I find that Respondent has maintained[10] an overly broad rule against solicitation in violation of Section 8(a)(1) of the Act.

F. Whether Respondent Unlawfully Prohibited Employees from Handbilling

Paragraph 7 (a) of the Complaint alleges that Plant Manager Danny Ming on or about June 23 and June 30 prohibited an employee from distributing Union literature to other employees on Respondent's parking lot. Paragraph 7(b) alleges that Operations Manager Ray Dudley, in late-August prohibited employees from distributing Union literature to other employees on the Respondent's parking lot. There is no factual dispute that both Ming and Dudley asked Tabor to leave the parking lot when he was handbilling for the Union. The issue, however, is whether Respondent's agents acted lawfully in this prohibition.

In response to the Union's grievance, Ming stated that the parking lot is company property and thus covered under the "no solicitation" policies maintained by both the plant and the company. The Board has determined that a "no access" rule is valid only if it (1) limits access solely with respect to the interior of the plant [or] other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Except where justified for business reasons, "a rule which denies off-duty employee entry to parking lots, gates, and other outside nonworking areas will be found invalid." *The Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117, slip op. at 13 (2004); *Tri-County Medical Center*, 222 NLRB 1089 (1976). Accordingly, Respondent offered no justified business reason for requiring Tabor to leave Respondent's parking lot other than the application of its unlawful no solicitation rule.

Respondent argues that it lawfully prohibited employee Tabor and Union Representative McKinney from distributing Union literature on Respondent's property in June

[10] The overall evidence indicates that Respondent maintained this solicitation policy for a period of more than six months prior to the filing of the charge. The fact that Respondent maintained the rule outside the 10(b) period does not serve as a defense to the violation, but rather constitutes a "continuing violation."

2004. Relying upon the Supreme Court's decision in *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 532 (1992), Respondent asserts that the Act confers Section 7 rights only on employees, not on unions or their nonemployee organizers. Respondent argues that Section 7 rights are not enlarged by the presence of an employee during a nonemployee union representative's distribution of union literature on company property. Respondent further asserts that the nonemployee's presence actually diminishes the employee's Section 7 rights. Citing *NLRB v. Cranston Print Works Co*., 258 F.2d 206, 213 (4th Cir. 1958), Respondent further asserts that an employee forfeits any special right to enter an employer's property, such as the employer's parking lot, and distribute union literature when the employee is accompanied by a nonemployee union representative. I note that the case cited by Respondent dealt with the employer's application of a nondiscriminatory distribution rule to a nonemployee union representative and an employee who was on an extended leave of absence. Interestingly, the Court distinguished the rights of access for the employee on a leave of absence with those employees who were active employees.

More recently however, the Board has found in similar circumstances that the presence of a nonemployee union representative did not diminish an employee's Section 7 rights. In *Material Processing, Inc*., 324 NLRB 719 (1997), a nonemployee union representative handbilled with two or three employees on company property. The employer's plant manager approached the union representative and informed him that he could not remain on company property and the union representative and the employees left in response to the directive. The Board found that even if the plant manager only addressed the union representative, it was reasonable for the employees to believe that the plant manager was addressing them as well and that the employer's action constituted a violation of Section 8(a)(1). Contrary to Respondent's argument, the presence of a nonemployee union representative has not prevented the Board in finding a violation of Section 8(a)(1) when an employer evicts employees while engaged in protected activities. See *Trailmobile Trailer, Inc*., 343 NLRB No. 17, slip op. at 14 (2004). By contrast, I note that in the instant case, Ming does not deny that he not only asked Tabor to leave the parking lot, but that he also threatened to call the police if he did not. Dudley acknowledged that when he asked the union representative to leave the parking lot in late August, two other individuals who "had papers in their hands" accompanied the representative. Accordingly, I do not find that McKinney's presence diminished employees' Section 7 rights as asserted by Respondent.

Respondent also argues that a union may waive certain solicitation and distribution rights through a collective bargaining agreement. Citing *NLRB v. United Techs Corp.*, 706 F.2d 1254, 1263-64 (2d Cir. 1983), Respondent argues that the Second Circuit has held that if employees are free to engage in solicitation during nonworking times, the union has power to bargain away employee rights to engage in solicitation at other times. I note however, that in *United Techs Corp*., there was a contract provision that banned solicitation of union membership or conducting union business on "working hours." The court noted that the provision had been included in the collective bargaining agreement for many years and that the term "working hours" had been interpreted by all concerned, as well as by an arbitrator 25 years before. The court observed that based upon the testimony at trial, arbitration decisions, and past practice, there was no ambiguity as to "working hours." Respondent asserts that it does not maintain or enforce a total ban on union solicitation and distribution. Respondent asserts that its rule, which it adopted pursuant to a management functions provision in the Agreement, allows solicitation and distribution during nonworking time and in nonworking areas. Despite Respondent's assertion, however, the record evidence reflects

that during this same period of time, Respondent maintained a rule prohibiting "solicitation on company premises without authority or during regular work hours." As discussed above, I find this to be an unlawful no solicitation rule. Unlike the circumstances found in *United Techs Corp*., there is no evidence that the Union has waived any Section 7 rights by the existence of the management functions clause. Based upon the total record evidence, I find that Respondent violated Section 8(a)(1) by unlawfully prohibiting employees from engaging in activity protected by Section 7 of the Act in June and late August and as alleged in complaint paragraph sections 7(a) and (b).

G. Whether Respondent Disparately Enforced a Provision of its Employee Handbook

Respondent's corporate employee handbook includes the following language:

> Rules, Regulations and Procedures for the acceptable conduct of employees are necessary for the benefit and protection of the rights and safety of all employees and for the orderly operation of our business. These rules are normally things that are to be done or things not done in order to have acceptable conduct. Failure to abide by these rules can lead to some form of corrective action up to and including discharge.

In addition to the invalid solicitation rule previously discussed, the list also includes:

> Starting or nurturing false, malicious rumors or information about fellow workers, the company, or its products.

Complaint paragraph 8(b) alleges that about July 16, 2004, Respondent, by Danny Ming, enforced the rule selectively and disparately by citing the rule in response to the Union's July 14, 2004 grievance.

Respondent argues that Section 7 of the Act does not protect distribution of maliciously false information. In support of its position, Respondent cites the Board's ruling in *Sprint/United Management Co.*, 339 NLRB No. 127 (2003) wherein an employee sent an e-mail to employees on November 21, 2001, stating that anthrax had been confirmed at the employer's facility. Board Member Liebman noted that the timing and context of the email could not be ignored as it occurred in the midst of widely publicized anthrax deaths and contamination incidents. The Board affirmed the administrative law judge in finding that the e-mail was sent with deliberate falsity and the employee's actions were outside the protection of the Act. Respondent also cites *Simplex Wire & Cable Co*., 313 NLRB 1311, 1313, 1315 (1994), in which the Board found that a rule prohibiting "false or malicious" statements unduly restricted employees' Section 7 rights because it prohibited merely false statements, as opposed to maliciously false statements. Respondent argues that by contrast, its maintenance of a rule prohibiting maliciously false statements does not interfere with Section 7 rights.

Relying upon the Board's decision in *Sprint/United Management Co.*, Respondent argues that a statement is "maliciously false" and loses Section 7 protection if it is made with knowledge that it is false or with reckless disregard for the truth or falsity of the statement. Respondent's counsel argues that the Union's handbill stated "Last year the company said that we didn't need a raise" and thus wrongly implied that Respondent was responsible for

the lack of a wage increase. Counsel further argues that Tabor and McKinney distributed the handbill with full knowledge of their falsity or with reckless disregard for their truth or falsity because they knew that Respondent had never made that statement and that the labor agreement automatically renewed because of the Union's failure to timely request reopening for bargaining.

Citing *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 528 (6th Cir. 1984), Counsel for the General Counsel argues that in determining whether an employer has unlawfully interfered with an employee's Section 7 rights, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees. Counsel for the General Counsel asserts that the Respondent and the Union disagreed as to who was to blame for the unit employees not receiving wage increases in 2003. While Counsel for the General Counsel concedes that the Union's literature suggests the Respondent was at fault, Counsel also submits that Ming's June 24 memo to employees states that the Union "forgot" about employees.

In its 1953 decision in *IBEW Local 1229 (Jefferson Standard*), 346 U.S. 464 (1953), the Supreme Court held that employees may engage in communications with third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection. Thirteen years later, the Court reiterated that nonmalicious false statements could be protected in the context of a union/management dispute. The Court noted that the Board has given wide latitude to competing parties in a labor dispute and does not "police or censor propaganda," but "leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements."[11] *Linn v. United Plant Guard Workers of American*, *Local 113*, 383 U.S. 53 (1966). In its decision in *Emarco, Inc*., 284 NLRB 832 (1987), the Board found that employees' remarks about their employer to be an extension of a legitimate and ongoing labor dispute. The remarks, however, included such statements as "these people never pay their bills" and "it will take a couple of years to finish the job." The Board noted that the definition of labor dispute under Section 2(9) of the Act includes "any controversy concerning terms, tenure or conditions of employment." The employees' failure to specifically reference the labor dispute in their remarks did not remove their remarks from the protection of Section 7 of the Act.

General Counsel argues that Respondent's rule prohibiting starting or nurturing false and malicious rumors or information was applied in the context of employees engaging in protected concerted activity, specifically that akin to union organizing. General Counsel submits that inasmuch as there was a dispute between management and labor concerning who was responsible for employees not receiving a raise, the Union's statement is protected speech within the framework of the Supreme Court's *Linn* decision. As Counsel for the Union points out in his brief, a statement must be made "with knowledge that it was false or with reckless disregard for the truth" in order for it to lose the Act's protection and "overenthusiastic use of rhetoric" is protected. *Long Island College Hospital*, 327 NLRB 944, 947 (1999).

The Union argues that even though the Union failed to give adequate notice of its

[11] *Stewart-Warner Corp*., 102 NLRB 1153, 1158 (1953).

desire to negotiate a successor contract, Respondent could have nonetheless negotiated a wage increase and by doing so was blameworthy for the lack of a raise. While such an expectation appears to be not only unrealistic, but also highly improbable under such circumstances, the Union's handbill did not, however, offer this potential explanation to employees. The handbill attributed the lack of a raise to the employer by stating "Last year the company said that we didn't need a raise." In response, Ming issued a memorandum to employees on June 24, explaining that the union's statement was not true and that contract negotiations were not instituted in 2003 because the Union failed to request a new contract. Ming went on to explain that the company unsuccessfully tried to get the National Labor Relations Board to agree that there had been no contract renewal.

Based upon the total record evidence, it is apparent that the statements in the Union's handbill were clearly in the context of a labor/management dispute. As envisioned by the Court in *Linn*, Respondent quickly corrected any inaccuracy and presented a full explanation of Respondent's position for employees. While arguably inaccurate, the Union's statement is nothing more than an overenthusiastic use of rhetoric rather than a deliberately malicious statement designed to publicly disparate Respondent's product or to undermine its reputation. *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979). While the Union's statement may be misleading as to why employees did not receive a 2003 wage increase, the record does not reflect that the handbill was distributed with a malicious intent or as a part of a design to deliberately falsify. *San Juan Hotel Corporation*, 289 NLRB 1453, 1455 (1988); *Veeder Root Co.,* 237 NLRB 1175, 1177 (1978). Accordingly, I do not find that the Union's handbill lost the protection of the Act as argued by Respondent.

Having found that the handbill did not lose the protection of Section 7 of the Act, the question turns to whether Respondent selectively and disparately enforced the rule in its response to the Union's grievance. Ming testified that there had been no other occasions when he applied the rule prohibiting "starting or nurturing false, malicious rumors" as contained in the employee handbook. He also testified that one of the reasons that he had not allowed Tabor to handbill in the parking lot was the fact that he received complaints from two employees that the Union was bothering them with the distribution of the handbills. While he identified Chris Wiggins as one of the employees who complained, he could not recall the other employee. Chris Wiggins did not testify and there was no other corroboration of Ming's testimony with respect to employee complaints. Ming acknowledged that he did not question Tabor or McKinney concerning the alleged complaint.

The total record evidence demonstrates that Respondent's enforcement of its prohibition concerning false and malicious rumors was responsive to the employees' distribution of the Union handbills and activity that was protected by Section 7 of the Act. Admittedly, this provision of the handbook had not previously been enforced. Accordingly, I find that Respondent selectively and disparately enforced its rule in violation of Section 8(a)(1) of the Act.

H. Whether Respondent Unlawfully Granted Stock to Unit Employees

Paragraph 10 of the complaint alleges that on about August 16, 2004 Respondent awarded 100 shares of stock to unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct. There is no factual dispute that the shares of stock were awarded to employees without prior notice to or

bargaining with the Union. Respondent asserts, however, that the stock award was a gift to employees and not subject to mandatory bargaining.

As referenced above, Respondent has 12 other manufacturing facilities in the United States in addition to its facility in Van Buren Arkansas. As also noted above, a union also represents the employees at Respondent's Calvert City, Kentucky facility. On August 16, 2004, Westlake Chemical Corporation, Respondent's parent company, announced in an interoffice memorandum to all regular, full-time employees that it would award 100 shares of stock to each eligible employee. This announcement was made in conjunction with Westlake's initial public stock offer (IPO) that occurred on August 11, 2004. Respondent informed employees in the memorandum that the stock was given in recognition of the historic company event and the significant contribution made by each employee toward the growth and success of the company. Respondent told employees that the stock was given in appreciation for their efforts. All regular, full-time employees with at least six months of service as of August 16 were eligible to receive this one-time stock award. Respondent maintains that the award was not linked to remuneration or an individual employee's job performance, and Westlake awarded the stock based on its financial condition after the IPO. Respondent argues that because the stock was a gift, it was not obligated to engage in bargaining with the Union before issuing the shares to employees. There is no dispute that the stock was given to all eligible employees at all of the Respondent's facilities. Respondent does not dispute that it awarded the stock to employees without notice to or bargaining with the unions that represented employees at other facilities.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." The Supreme Court has interpreted Section 8(d) of the Act to require the employer and the union to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958). The Court further noted, however, that as to other matters, each party is free to bargain or not to bargain, and to agree or not to agree. *Ibid.* Accordingly, the initial issue with respect to Respondent's unilateral awarding of stock to employees is a determination as to whether the granting of stock to employees was a mandatory subject of bargaining.

The Board and courts have held that gifts per-se payments that do not constitute compensation for services are not terms and conditions of employment. If such gifts, however, are so tied to the remuneration that employees receive such awards for their work, such gifts are considered wages and within the statute. *Ross Sand Company, Inc*., 219 NLRB 915 (1975); *NLRB v. Harrah's Club*, 403 F.2d 865, 874 (9th Cir. 1968); *NLRB v. Wonder State Mfg. Co*., 344 F.2d 210, 213 (8th Cir. 1965).

In the instant case, all employees, including hourly employees, supervisors, and management employees, were given a one-time award of 100 shares of stock based upon Respondent's initial public offering. There was no evidence that any other such award was planned or even anticipated for employees.[12] The award was not based upon seniority or

[12] In *United Shoe Machinery Company, Inc*. 96 NLRB 1309 (1951), the Board found that the employer's long-established policy and method of granting 10 shares of common stock to every employee with at least 25 days of service was an emolument of value that was earned by reason of

Continued

productivity. The only eligibility requirement was employment of at least six months duration prior to August 16, 2004.[13] There is no evidence that the stock award was a gift made to employees over a substantial period of time or based upon their respective wages.[14] All individuals received the same amount of stock regardless of whether they were at the highest level of management or the lowest paid hourly employee. The stock award was given to all eligible employees regardless of their work performance, earnings, seniority, production, or other employment related factors. Accordingly, I find that the stock award given to employees on August 16, 2004 constituted a gift and was not a mandatory subject of bargaining that required notice to or bargaining with the Union. See *Stone Container Corp*., 313 NLRB 336, 337 (1993); *Benchmark Industries, Inc*., 270 NLRB 22 (1984), enfd. 724 F.2d 974 (5th Cir. 1984). Accordingly, I not find the Respondent's unilateral award of stock shares to its employees to constitute a violation of Section 8(a)(5) as alleged.

Respondent argues that even if the stock award was not a gift to employees, "the Union waived the right to bargain over wage increases." Article IX of the collective bargaining agreement provides:

> Wages and rates of pay for the duration of this contract shall be shown by Exhibit A, attached and made a part of this Agreement. The rates of pay specified in Exhibit A are rates which the Company is contractually obligated to pay, but nothing in this Agreement shall be construed as preventing the Company in its discretion from paying employees in a department a higher rate and/or improving a benefit (whether it be an enhancement of the current benefits or a reduction in the premium contribution) than the employees in the department would otherwise be entitled to under this Agreement.

Respondent also relies upon the language found in Article XIX providing:

> Section 2. The parties acknowledge that during the negotiations which resulted in the Agreement, each has had the unrestricted right and opportunity to present demands and proposals with respect to any matter subject to collective bargaining. Therefore, the Company and the Union freely agree that during the period of this Agreement, neither part shall be obligated to bargain with respect to wages, pensions, or other fringe benefits in view of the fact that such matters were taken into consideration in settlement of the issues

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the employment relationship.

[13] In *Richfield Oil Corporation*, 110 NLRB 356 (1954), the Board found that employees' membership in a stock option plan was a mandatory subject of bargaining. In addition to the requirement that membership was limited to employees, the Board also found significant the long term accumulation of stock for future needs as well as the provision that the benefits were based upon the employees' length of service as well as the employees' amount of wages while participating in the plan. The Board also noted that employees who were members of the plan performed their work under a pledge from the employer of future payments in the form of company stock as well as ordinary wages.

[14] Where gifts by an employer have been made over a substantial period of time and, in amount, have been based on respective wages, such gifts are treated as bonuses and akin to remuneration found in pensions, retirement plants, or group insurance. *NLRB v. Niles-Bement-Pond Co*., 199 F.2d 713 (2nd Cir. 1952).

> discussed during negotiations, or with respect to not covered or referred to in this Agreement, except in the manner specified herein.

In support of its position that the Union waived its right to bargain about the stock award, Respondent cites the Board's rulings in *Johnson-Bateman Co*., 295 NLRB 180 (1989) and *EPI Corp.,* 279 NLRB 1170 (1986). In *Johnson-Bateman Co*., the collective bargaining agreement provided that while the wage rates were set forth in the agreement, it was not to be construed as preventing the employer from paying or the employee accepting additional pay or benefits. The employer unilaterally implemented an attendance incentive bonus. The Board found that contractual language was sufficiently clear and specific to establish that the union contractually waived its right to bargain about the attendance incentive bonus. The Board further observed that there was no record evidence that the parties discussed this particular contract provision during negotiations for the existing collective bargaining agreement. The language in issue had been in each successive contract for 26 years and neither party proposed any changes in the language during negotiations for the current contract. Accordingly, the Board found that the union waived its bargaining rights on this subject based on the express contractual language.

In *EPI Corp*., 279 NLRB 1170, 1173-1174 (1986), the parties negotiated a labor agreement containing a "zipper clause" specifying "all aspects of wages, hours or working conditions which are not covered by this Agreement may be changed, altered, continued, or discontinued without consultation with the Union." The Board noted that while it was not apparent that the parties specifically addressed the issue of midterm adjustments in the health program during contract negotiations, the evidence reflected that the parties negotiated a complete agreement. In summary, the Board found that the union waived its interest in bargaining with respect to the carrier-induced changes in the employees' health benefit plan.

The Union argues that while the collective bargaining agreement permits Respondent to improve existing, ongoing compensation programs on a department-wide basis, it does not permit one time, plant-wide gifts. The Union acknowledges that the employer prevailed in *Johnson-Bateman*, where, although the contract broadly permitted additional pay, the employer paid only merit increases to individual employees. The Union argues that by comparison to *Johnson-Bateman*, the Board's rulings in *Register-Guard*[15] and *C & C Plywood Corp*.[16] reflect that the Board narrowly construes contract language granting an employer the right to discretionarily increase compensation. The contractual language in *Register-Guard* not only provides that the employer may pay wages in excess of the minimum wage but also specifically addresses the granting and reducing of merit pay. In reviewing the case, the Board considered the fact that at an impasse and throughout negotiations, the wage scale was a point of contention. During impasse, the employer upwardly adjusted wage scales for a portion of the employer's employees. The adjustment was not based upon merit increases but was based upon a local personnel survey. There was no bargaining about the employer's decision to award the increases, which represented the first time that the employer unilaterally increased the wages of an entire classification of

[15] 301 NLRB 494, 495 (1991).

[16] 148 NLRB 414, 417 (1964), enfd. denied 351 F.2d 224 (9th Cir. 1965), rev'd and remanded 385 U.S. 421 (1967).

employees above contract scale. The Board concluded that the contract language afforded the employer discretion to increases for particular individuals over the wage-scale minimum for their classification rather than the general wage increases for an entire classification of employees.

In *C & C Plywood Corp*., above, the parties negotiated a collective bargaining agreement providing that the employer reserved "the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude, or the like." Without bargaining with the union, the employer subsequently awarded premium pay to a classification of employees provided that they met certain production standards. The Board held that the union did not waive its bargaining right because the clause granted the employer only the right to make individual merit increases for special competence and skill. The Board did not find the award to be premium pay within the meaning of the contractual language, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union.

The Union acknowledges that its contract with the Respondent permits Respondent to give more general discretionary compensation increases than the language in *Register-Guard* or in *C & C Plywood*. The language provides that nothing in the agreement "shall be construed as preventing the Company in its discretion from paying employees in a department a higher rate and/or improving a benefit (whether it be an enhancement of the current benefits or a reduction in the premium contribution) than the employees in that department would otherwise be entitled to under this Agreement." The union argues, however, that as in *Register-Guard* and *C & C Plywood*, Respondent overstepped its contractual bounds by providing a benefit to almost every employee, rather than by providing an improvement limited to specific departments. The Union argues that the contract language should be interpreted to allow Respondent to discretionarily improve only existing wage rates and existing benefits. While the Union maintains that the contract provision implies that Respondent is limited to improving only an existing benefit, I do not find the language limited to such specificity.

The Union submits: "The 100 stock shares are a brand new benefit. It is not an improvement of a current benefit. There is no similar existing program. There are no references to stock giveaways in any contract article. Moreover, it is a one-time gift. The employees do not continue to enjoy the benefit into the future." As discussed in detail above, I agree, and as discussed above I find that as a gift, the stock award was not a mandatory subject of bargaining. In the event that the stock award is not found to be a gift, the record nevertheless reflects that such increase in benefits was permissible under the express contractual provision as found by the Board in *Johnson-Bateman Company*, *supra*, at 189. The fact that the stock award occurred but once does not negate its constituting an increase in benefits as expressly provided in the contractual language.

While the express language in Article XI may constitute a waiver with respect to Respondent's obligation to bargain about the stock award, I do not find the "zipper clause" contained in XIX as an effective waiver of the Union's right to bargain about the stock award. The contractual language provides: "The parties acknowledge that during the negotiations which resulted in the Agreement, each has had the unrestricted right an [sic] opportunity to present demands and proposals with respect to any matter subject to collective bargaining. Therefore, the Company and Union freely agree that during the period of this Agreement,

neither party shall be obligated to bargain with respect to wages, pensions, or other fringe benefits in view of the fact that such matters were taken into consideration in settlement of the issues discussed during negotiations; or with respect to any matter or subject not covered or referred to in this Agreement, except in the manner specified herein." While the parties may have had an opportunity to bargain during negotiations, there was no contemplation of stock distribution at the time of negotiations and no evidence of any discussion with the Union of any possibility of stock distribution. Accordingly, I do not find Article XIX to constitute a waiver with respect to the stock shares award.[17]

Accordingly, I do not find that Respondent unilaterally granted the stock shares in violation of Section 8(a)(5) and (1) of the Act.

I. Whether Deferral of the Complaint Issues is Appropriate

On December 14, 2004, Respondent filed a motion for summary judgment in this matter. In its motion, Respondent asserts that the matters involved in the complaint are more appropriately suited for the grievance-arbitration process as contemplated by the Board in its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971). On January 4, 2005, the Union filed a memorandum in opposition to Respondent's motion for summary judgment. By letter dated January 5, 2005, the Board's Associate Executive Secretary informed the Union that its memorandum[18] had not been timely filed and could not be forwarded to the Board for consideration. The motion is pending before the Board.

Respondent argues that the issues raised in the complaint are contractual and thus the interpretation and application of provisions of the collective bargaining agreement are in dispute. Respondent asserts that while the complaint alleges that it violated Section 8(a)(1) of the Act by maintaining and enforcing a no-solicitation rule found in Respondent's handbook, Respondent argues that it had a contractual right to promulgate and enforce this rule. Further, Respondent points out that while its unilateral award of 100 shares of stock is alleged as a violation of Section 8(a)(5) of the Act, Respondent was allowed to do so based upon the language of the contract.

Respondent relies upon a number of cases where the Board has deferred to the grievance-arbitration process. Respondent asserts that in *Caritas Good Samaritan Medical Center,* 340 NLRB No. 6, slip op. at 5 (2003), the Board found that the parties' agreement was not free from ambiguity and found that the dispute concerning the employer's unilaterally changing unit employees' health insurance was a matter of contract interpretation. The dispute involved in *Radioear Corp*., 199 NLRB 1161 (1972) involved an employer's unilaterally terminating an annual bonus paid to employees. The employer argued that during negotiations the union tried to get a clause preserving all existing benefits and the union argued that there was no intent for the employer to be able to unilaterally discontinue a benefit. The Board determined that interpretation of the "zipper clause" and the collective-bargaining agreement was at the heart of the dispute, and deferred the matter to arbitration.

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[17] *Michigan Bell Telephone Co*., 306 NLRB 281 (1992).

[18] The Union's December 27, 2004 e-mail request for an extension of time to file its opposition was not recognized by the Associate Executive Secretary as complying with requisite Board procedures.

The Board reasoned that an arbitrator could consider "(a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon; (b) other proposals advanced and accepted or rejected during bargaining; (c) the completeness of the bargaining agreement as an 'integration'-hence the applicability or inapplicability of the parole evidence rule; and (d) practices by the parties, or other parties, under other collective bargaining agreements."

Respondent contends that the issues involved in this case are appropriate for deferral because the complaint allegations deal with the Respondent's contractual right to promulgate and enforce rules in the employee handbook and whether Respondent is permitted to unilaterally grant a stock award to employees. In essence, Respondent argues that an interpretation of the contractual language will resolve these issues and thus, a matter appropriate for deferral to the grievance-arbitration procedure. Contrary to Respondent's argument, I do not find the issues involved herein, appropriate for deferral.

There is certainly no question that the parties negotiated and agreed to resolve disputes regarding the application or interpretation of the agreement through arbitration. Article XII of the collective bargaining agreement sets forth the procedure for resolution of disputes through the grievance-arbitration procedure. In its decision in *Collyer Insulated Wire*, *supra*, the Board found deferral appropriate when: (1) the dispute arose within the confines of a long and productive collective bargaining relationship; (2) there was no claim of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provided for arbitration in a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issues; (5) the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well-suited to resolution by arbitration. Respondent asserts that deferral is appropriate in this matter because all of the criteria have been met.

While a number of these criteria have been met, it does not appear that deferral in this case is appropriate. As discussed above, Respondent argues that it was permitted to grant the stock award to employees because the award constituted a gift and not a mandatory subject of bargaining. Accordingly, Respondent argues that it has not violated Section 8(a)(5) of the Act by failing to bargain with the representative of its employees as required by the Act. This question is resolved by statutory interpretation. While Respondent argues that it was contractually permitted to promulgate and enforce rules in the employee handbook, the lawfulness of Respondent's solicitation provision also involves a matter of statutory interpretation.

The Board's policy against deferral in matters of statutory interpretation is well established. *Avery Dennison*, 330 NLRB 389, 390 (1999). Generally, the Board does not defer an issue to arbitration that involves the application of statutory policy, standards, and criteria, rather than the interpretation of the contract itself. The Board has specifically noted that questions of statutory construction, as distinguished from contract interpretation, are legal questions concerning the National Labor Relations Act, and thus are within the special competence of the Board rather than an arbitrator. *Carpenters (Manufacturing Woodworkers Assn.),* 326 NLRB 321, 322 (1998).

The lawfulness of Respondent's maintenance and enforcement of its solicitation rule is in issue, as is the lawfulness of Respondent's granting the stock shares to its employees. An interpretation of the contract will not resolve the legal questions in issue. I note also that

even if one of these issues are found to be appropriate for arbitration, Board policy does not favor bifurcation of proceedings that involve related contractual and statutory questions because of the inefficiency and possible overlap that may occur from the consideration of certain issues by both the Board and the arbitrator. *Sheet Metal Workers Local 17 (George Koch Sons*), 199 NLRB 166, 168 (1972).[19] Additionally, there is no guarantee that an arbitrator will look beyond the contract and consider statutory principles. *Carpenters (Novinger's Inc.),* 337 NLRB 1030, 1034 (2002).

A key element of the Board's deferral policy is the parties' expressed willingness to waive contractual time limitations in order to ensure that the merits of the dispute are addressed. *Hallmor, Inc.*, 327 NLRB 292, 293 (1998). The Union asserts that the allegation that Respondent prohibited an employee from distributing handbills in the parking lot is not deferrable because the Respondent pursued its timeliness objection into the arbitration procedure. During the course of the grievance processing, Respondent asserted that the Union did not timely appeal the step-two response from the plant manager. While Respondent later agreed to proceed to arbitration, Respondent sought to also include timeliness as an issue for the arbitrator. By letter dated August 31, 2004, the Union informed Respondent that inasmuch as Respondent persisted in challenging the grievance's timeliness, the Union desired that the matter be resolved by the National Labor Relations Board and informed Respondent that the Union would take no further steps pursuant to the contact's grievance arbitration procedure. By letter dated September 8, 2004, Respondent informed the Union that despite the Union's letter of August 21, 2004, proceeding to arbitration was mandatory under the terms of the contract. Respondent sent a follow-up letter to the Union on October 8, 2004, reiterating that it had agreed to proceed to arbitration on the grievance. Respondent did not, however, retract its desire to have the arbitrator consider the timeliness issue of the Union's grievance. Eventually, rather than waive timeliness, Respondent agreed that the grievance be withdrawn from arbitration, after the parties had chosen an arbitrator.

Respondent asserts in its brief that it is willing to arbitrate these matters and waives any time limits or procedural defects and agrees to submit all aspects of the dispute to arbitration. While Respondent may assert that it will waive the timeliness provision of the contract to present the matter to the arbitrator, Respondent does not assert that it will not pursue the initial timeliness issue as one of those issues to be submitted to the arbitrator. Thus, it appears that despite Respondent's assertion that all elements for deferral have been met; Respondent's challenge to the timeliness of the initial grievance may foreclose an arbitrator's reaching the merits of the issues in dispute. See *Southwestern Bell and Telephone Company*, 276 NLRB 1053, fn. 1 (1985); *Victor Block, Inc*., 276 NLRB 676, 680 (1985).

Citing *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000), Counsel for the General Counsel also asserts that where an employer has maintained an illegal

[19] The complexity of issues in this case are distinguishable from those in *Wonder Bread*, 343 NLRB No. 14, slip op. at 3 (2004) that involved an employer's unilateral implementation of a physical examination for certain of its employees. The Board found that the employer's reliance upon the management rights clause for its action created a dispute as to the interpretation of the collective bargaining agreement.

handbook at multiple locations, the appropriate remedy should include a posting at every facility where the rule has been in effect. Counsel for the Union submits that the solicitation rule allegation is not deferrable because an arbitrator can impose no remedy at Respondent's facilities other than the Van Buren facility. Citing *Clarkson Industries*, 312 NLRB 349, 351-352 (1993), the Union further argues that when an arbitrator is unable to provide a sufficient remedy, deferral is inappropriate.

Having considered the arguments advanced by Counsel for the General Counsel, Respondent, and the Union, I find that deferral is not appropriate in this case and recommend accordingly.

J. The Appropriate Remedy for Respondent's Overly Broad No Solicitation Rule

Citing a number of cases, the Union submits that where an employer has maintained an illegal handbook at multiple locations, the remedy should include a posting at every facility where the rule has been in effect. *Jack in the Box Center Systems*, 339 NLRB No. 5, slip op. at 1 (2003); *Raley's*, 311 NLRB 1244, 1244, fn. 2 (1993); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 & fn. 33 (1990). There is no dispute that Respondent's rule prohibiting solicitation on company premises without authority or during regular work hours has been maintained in Respondent's corporate employee handbook. Respondent does not dispute that this handbook was distributed to employees at facilities other than the Van Buren plant.[20] Based upon the total record evidence, it appears appropriate to require the rescission of the overly broad no solicitation provision, and the posting of the notice coextensive with Respondent's application of its handbook.[21]

The Union also argues that in addition to the required posting, Respondent should be ordered to notify employees in writing that the unlawful rule is no longer in effect. Certainly, the Board has found it appropriate to require an employer to publicize the rescission of an unlawful rule in the same fashion that the unlawful rule was publicized. *Ark Las Vegas Restaurant Corp*., 335 NLRB 1284, 1285 and fn. 7 (2001); *Marriott Corp*., 313 NLRB 896, 896 (1994). Steven Edwards; manager of corporate human resources, testified that on December 2, 2004, Respondent posted at its Van Buren facility a memorandum to employees concerning Respondent's solicitation rules. In the notice, Respondent informed employees that the solicitation policy in the local plant rules was rescinded. Additionally, Respondent notified employees that the employee handbook provision would immediately read as follows:

> The performance of our employees and the quality of our product can be adversely affected by solicitation or the distribution of literature. Therefore, solicitation during work time and the distribution of literature during work time or in work areas are prohibited.

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[20] In his testimony, Ming asserted that he relied upon the local plant rules rather than the corporate employee handbook. In his July 16, 2004 written response to the Union's grievance, however, he referred to the corporate rules of conduct prohibiting "solicitation on company premises without authority or during regular work hours."

[21] *Jack in the Box Distribution Center Systems*, *supra,* at 1.

The memo stated that effective immediately the provision regarding solicitation in the Rules of Conduct "is revised to read as follows:"

> Solicitation during work time, or distribution of literature during work time or in work areas.

Edwards explained that this memorandum was posted on the bulletin board at Van Buren as well as the bulletin boards at Respondent's other facilities. Edwards acknowledged that while there had been a posting of the rescission and modification of the solicitation and distribution policy, there was no distribution to individual employees. He also testified that he was unaware of any meetings with employees to discussion the rescission and modification of the rules. It appears therefore, that an appropriate remedy would require Respondent to disseminate the modification of its solicitation and distribution policy in the same manner in which the original unlawful policy was disseminated to employees. Accordingly, an appropriate remedy would also require Respondent to notify all of its employees, to whom the handbook was disseminated, individually, in a separate document from the posting, that the unlawful rule has been rescinded and modified.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by maintaining, giving effect to, and enforcing an overly broad no solicitation rule prohibiting solicitation on company premises without authority or during regular work hours.

4. Respondent violated Section 8(a)(1) of the Act by selectively and disparately enforcing a facially valid employee rule.

5. Respondent violated Section 8(a)(1) of the Act by prohibiting employees from distributing Union literature to other employees on Respondent's parking lot.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act in any other manner as alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent unlawfully maintained and enforced an overly broad no

solicitation rule prohibiting solicitation on company premises without authority or during regular work hours. As discussed above, Respondent rescinded its overly broad solicitation policy on December 2, 2004 and notified employees by posting a notice on the company bulletin board. I recommend that Respondent also disseminate this notice individually to all its employees[22] in a separate document and in the same manner as the dissemination of the unlawful solicitation policy. Additionally, I recommend that Respondent post a Board notice to employees at all facilities where the employee handbook has been or is in effect.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[23]

ORDER

The Respondent, North American Pipe Company, Van Buren, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing an overly broad no solicitation rule that prohibits solicitation on company premises without authority or during regular work hours.

(b) Selectively and disparately enforcing its rules because employees exercise their Section 7 rights.

(c) Prohibiting employees from distributing Union literature to other employees on Respondent's parking lot and exercising their Section 7 rights.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its Van Buren, Arkansas copies of the attached notice marked "Appendix,"[24] and, at each of its other manufacturing facilities where its employee handbook has been, or is in effect, copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all

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[22] At all facilities where employees received the handbook containing the unlawful provision.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places where notices to employees members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 2004.

(b) Within 14 days after service by the Region, distribute copies of Respondent's revised solicitation and distribution rules individually to all employees who have received individual copies of Respondent's employee handbook.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a provision in our employee handbook that prohibits you from soliciting on company premises without authority or during regular work hours.

You have the right to distribute union literature in nonworking areas on company property during nonworking time. Nonworking areas include the company parking lot.

WE WILL NOT stop you from distributing union literature to other employees on the company parking lot by evicting you from our property.

WE WILL NOT selectively or disparately enforce the rules in our employee handbook because you engage in union or other concerted activity that is protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

NORTH AMERICAN PIPE CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1407 Union Avenue, Suite 800, Memphis, TN 38104-3627
901-544-0018, Hours: 9:00 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (901) 544-0011.